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14 Attorneys for Defendant

15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,	)	No. P1300CR20081339
	)	
18 Plaintiff,	)	Div. 6
	)	
19 vs.	)	<b>MOTION REGARDING</b>
	)	<b>OUTSTANDING JURY ISSUES</b>
20 STEVEN CARROLL DEMOCKER,	)	
	)	
21 Defendant.	)	
	)	
	)	
	)	

22 **MOTION**

23 Mr. DeMocker, by and through counsel, hereby respectfully requests that this  
24 Court consider several pending issues regarding the jury questionnaire and jury  
25 selection protocol in advance of the March 2, 2010 hearing on this matter.

26 **MEMORANDUM OF POINTS AND AUTHORITIES**

1 After earlier hearings outlining the issues with the State and the Court, on  
2 December 17, 2009, the defense filed a motion for adoption of a jury questionnaire,  
3 individual sequestered voir dire and for adoption of a jury selection plan. During  
4 hearings on January 22 and January 29, the jury questionnaire was discussed. The  
5 Court circulated copies of the questionnaire and the parties' typographical exceptions  
6 were noted for the Court on January 29, 2010. Trial is set for May of 2010 and counsel  
7 have proposed a jury selection plan that will require some immediate action in order to  
8 facilitate logistical issues. Therefore, counsel request that the Court set aside time to  
9 consider these issues in advance of the March 2, 2010 hearing date, and suggest this  
10 Thursday, February 4 following the hearing on motions filed by the victims as a time to  
11 consider these matters.

12 **1. Jury Questionnaire Issues**

13 Counsel propose to assist the Court with preparation of a video introduction to  
14 prospective jurors. As an initial suggestion, counsel would like the Court to review the  
15 attached preliminary instruction that admonishes potential jury members about the use  
16 of the internet and online social networks. The attached instruction has been proposed  
17 as a preliminary instruction by the Arizona State Bar's criminal jury instruction  
18 committee.

19 Also, in the first paragraph of the questionnaire, counsel propose inserting the words  
20 "including any internet searches or research" into the last sentence that prohibits panel  
21 members generally from conducting research. Counsel are aware of several well  
22 reported instances of jurors using online social media to write about their experiences as  
23 jurors or to research case issues during the jury selection process. This usually results in  
24 a mistrial or dismissal of a large number of prospective jurors. In an attempt to at least  
25 preliminarily address these issues, counsel propose the above precautionary measures.  
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1           Also, counsel object to the present version of question # 86 in the recent draft of  
2 the questionnaire. The question now reads "When deliberating in the sentencing phase  
3 of this trial, each juror is allowed by law to consider mitigating factors even if not  
4 argued by the lawyers or mentioned in the instructions from the court if supported by  
5 the evidence." Counsel objects to the concluding phrase "if supported by the evidence"  
6 and requests that it be struck.  
7

8           The Eighth and Fourteenth Amendments dictate that there be an individualized  
9 determination of the appropriate sentence. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954,  
10 57 L.Ed.2d 973(1978). Just as the statutory scheme cannot preclude consideration of  
11 mitigating evidence, so too "the sentencer [may not] refuse to consider, as a matter of  
12 law, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 114, 102  
13 S.Ct. 869, 877 (1982). Simply allowing the mitigating evidence to be admitted is not  
14 enough. "The sentencer must also be able to consider and give effect to that evidence in  
15 imposing sentence." *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 2947 (1989)  
16 (overruled in part by *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d  
17 335); *see also Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669 (1986)  
18 ("Evidentiary ruling excluding relevant mitigating evidence of defendant's adjustment  
19 to prison setting violates *Eddings*"); *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860  
20 (1988) (requirement of unanimous jury finding on mitigating factors created  
21 unconstitutional barrier to consideration of relevant mitigating evidence). Only when  
22 the capital juror is free to consider and give effect to all mitigating evidence is there an  
23 assurance that there has been an individualized sentencing determination. *Lockett*.  
24 Jurors are permitted to consider any factor that they find to be mitigating.

25           Counsel request that the phrase "if supported by the evidence" be struck and that  
26 the question instead read "When deliberating in the sentencing phase of this trial, each  
27  
28

1 juror is allowed by law to consider mitigating factors even if not argued by the lawyers  
2 or mentioned in the instructions from the court.”  
3

## 4 **2. Proposed Jury Selection Schedule**

5 Counsel have submitted a proposed jury schedule that proposes dates for the  
6 following: sending out summonses to prospective jurors, having jurors come to the  
7 courthouse to fill out the questionnaires, counsel to meet and confer to determine who  
8 can be agreed upon as excused based on challenges for cause and hardship issues, a  
9 hearing with the court to address final jury selection issues, and commencement of  
10 individual sequestered voir dire. This schedule proposes that the Jury Commissioner  
11 send out 400-500 jury summonses in March or early April 2010 and for jurors to fill out  
12 the questionnaires at the court house April 5-9. Counsel understand from earlier  
13 discussions with the Court and with the Jury Commissioner that arrangements will need  
14 to be coordinated with other judge's calendars and for space allocations for jurors.  
15 Counsel does not believe that addressing these issues at the hearing on March 2 will  
16 permit enough time to arrange these details. Wanting to avoid confusion and  
17 unnecessary chaos for the Court and Jury Commissioner, counsel request an immediate  
18 hearing on these issues or an order adopting the proposed jury selection schedule so  
19 counsel, the Court and the Jury Commissioner can move forward with the required  
20 logistical planning.  
21

## 22 **CONCLUSION**

23 Defendant Steven DeMocker, by and through counsel, hereby requests that this  
24 Court set a hearing to address the outstanding juror questionnaire and jury selection  
25 scheduling issues or adopted the proposed jury selection schedule as soon as possible.  
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27 DATED this 2d day of February, 2010.  
28

By: \_\_\_\_\_

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**ORIGINAL** of the foregoing filed  
this 2d day of February, 2010, with:

Jeanne Hicks  
Clerk of the Court  
Yavapai County Superior Court  
120 S. Cortez  
Prescott, AZ 86303

**COPIES** of the foregoing hand delivered this  
this 2d day of February, 2010, to:

The Hon. Thomas B. Lindberg  
Judge of the Superior Court  
Division Six  
120 S. Cortez  
Prescott, AZ 86303

Joseph C. Butner, Esq.  
Prescott Courthouse basket